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Liew Then Song & Anor v Percetakan Yelian Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — COMPANIES (WINDING UP) NO WA-28NCC-557–06 OF 2018

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WONG CHEE LIN JC

27 AUGUST 2018

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Companies and Corporations — Winding up — Petition — Petitioners filed winding up petition against respondents pursuant to s 465(1)(f) and (h) of the Companies Act 2016 — Whether there was irretrievable breakdown in relationship between shareholders — Whether there was deadlock at shareholder level — Whether it was just and equitable to grant winding up petition against respondents — Companies Act 2016 s 465(1)(f) & (h)

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This was a winding up petition presented by the petitioners to wind up the first respondent company Percetakan Yelian Sdn Bhd ('the company'). Back in 1980, the first petitioner and his brother Liew Ah Kiew @ Liew Then Hin ('LTH') started a printing business and they carried on a partnership. Thereafter the company was incorporated in 1985 with the first petitioner and LTH each holding one share in the company. Throughout the years, the shares of the company were allotted and transferred among the family members which involved the second petitioner, LTH's wife ('the second respondent') and Liew Tin Siew ('LTS'). On or about August 2010, LTH passed away and all of his shares were transferred to the second respondent. This resulted in the petitioners collectively holding 250,000 shares which was 50% of the shareholding of the company and the second respondent holding the balance 50% of the shareholding. The directors of the company were the first and second petitioners, the second and third respondents and LTS. The third respondent was the daughter of the second respondent. The petitioners claimed that sometime in September 2012, the second respondent wanted to dispose of her half undivided shares of the properties whereon the company's business was located to the first petitioner. The first petitioner's solicitors then counter offered to purchase from the second respondent on terms which were not agreeable to the second respondent resulting in the start of a bad relationship between the first petitioner and the second respondent. However, the relationship between the parties really became strained after the second and third respondents alleged that the first petitioner had breached his fiduciary duties. The directors by majority comprising the second and third respondents and LTS passed a resolution for the company to commence legal action against the first petitioner and in May 2018, a suit was filed in the Shah Alam Sessions Court against the first petitioner. The second and third respondents said that after the originating summons was filed against him, the first petitioner had abandoned management of the company whereas the first petitioner said that

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he was sidelined and that the second and third respondents had given notice to the employees not to take any instructions from him. Essentially, the petitioners relied on two grounds to justify the winding up of the company ie the relationship between the parties had broken down irretrievably so much so that the parties could not even speak to one another and they cannot see eye to eye on anything; and secondly, on the ground of deadlock at the shareholder level.

Held, allowing the petition with costs of RM20,000:

(1) The company was a quasi-partnership because it was originally started as a partnership between the first petitioner and LTH before it was converted to a limited company. The shareholders were all family members and the company was run on the basis of mutual trust and confidence or was so run, before the relationship completely broke down when the second and third respondents started suing the first petitioner (see para 33).

(2) There was a deadlock at shareholder' level in that the petitioners had 50% of the shareholding of the company whereas the second respondent had the remaining 50% and the petitioners did not attend the AGM of the company held this year, resulting in the meeting being inquorate. Nevertheless the respondents proceeded to finalise the minutes of the AGM and purported to pass various resolutions which were obviously void. Since the respondents had acknowledged that the relationship between the parties had irretrievably broken down, it would appear to be just and equitable that the company be wound up (see paras 40–41).

(3) The fact that the company was a going concern was not a reason for not granting a winding up order. The court could not find that it was the intention of the first petitioner to file this winding up petition to put pressure on the second and third respondents to agree to his terms for a buy-out (see paras 43–44).

[Bahasa Malaysia summary

Ini adalah petisyen penggulungan yang dikemukakan oleh pempetisyen untuk menggulung syarikat responden pertama Percetakan Yelian Sdn Bhd ('syarikat'). Pada tahun 1980, pempetisyen pertama dan abangnya Liew Ah Kiew @ Liew Then Hin ('LTH') memulakan perniagaan percetakan dan mereka menjalankan perkongsian. Selepas itu syarikat tersebut diperbadankan pada tahun 1985 dengan pempetisyen pertama dan LTH masing-masing memegang satu saham dalam syarikat tersebut. Sepanjang tahun, saham syarikat tersebut diagihkan dan dipindahkan di kalangan ahli keluarga yang melibatkan pempetisyen kedua, isteri LTH ('responden kedua') dan Liew Tin Siew ('LTS'). Pada atau sekitar Ogos 2010, LTH meninggal dunia dan semua sahamnya dipindahkan kepada responden kedua. Ini mengakibatkan

pempetisyen secara kolektif memegang 250,000 saham yang mana 50% daripada pemegangan saham syarikat tersebut dan responden kedua memegang baki 50% daripada pemegangan saham. Pengarah syarikat itu adalah pempetisyen pertama dan kedua, responden kedua dan ketiga dan LTS. Responden ketiga adalah anak perempuan responden kedua. Pempetisyen mendakwa bahawa pada September 2012, responden kedua ingin melupuskan saham yang tidak dibahagi bagi hartanah yang mana perniagaan syarikat itu terletak kepada pempetisyen pertama. Peguam pempetisyen pertama kemudian memberikan tawaran untuk membeli dari responden kedua dengan syarat yang tidak dipersetujui oleh responden kedua yang mengakibatkan permulaan hubungan buruk antara pempetisyen pertama dan responden kedua. Walau bagaimanapun, hubungan antara pihak-pihak benar-benar menjadi tegang selepas responden kedua dan ketiga mendakwa bahawa pempetisyen pertama telah melanggar tugas fidusiarinya. Pengarah yang majoritinya terdiri daripada responden kedua dan ketiga dan LTS meluluskan resolusi untuk memulakan tindakan undang-undang terhadap pempetisyen pertama dan pada Mei 2018, satu guaman difailkan di Mahkamah Sesyen Shah Alam terhadap pempetisyen pertama. Responden kedua dan ketiga mengatakan bahawa selepas saman pemula tersebut telah difailkan terhadapnya, pempetisyen pertama telah meninggalkan pengurusan syarikat tersebut manakal pempetisyen pertama menyatakan bahawa dia telah diketepikan dan responden kedua dan ketiga telah memberikan notis kepada pekerja untuk tidak mengambil apa-apa arahan daripadanya. Pada asasnya, pempetisyen bergantung pada dua alasan untuk membenarkan penggulungan syarikat iaitu hubungan antara pihak-pihak telah berpecah belah dengan tidak dapat lagi dipulihkan sehingga pihak-pihak tidak dapat bercakap dengan satu sama lain dan mereka tidak dapat bersetuju atas apa-apa; dan kedua, atas alasan kebuntuan di peringkat pemegang saham.

Diputuskan, membenarkan petisyen dengan kos RM20,000:

(1) Syarikat tersebut adalah separa perkongsian kerana ia pada mulanya dimulakan sebagai perkongsian antara pempetisyen pertama dan LTH sebelum ia ditukar kepada syarikat berhad. Pemegang saham adalah semua ahli keluarga dan syarikat tersebut dijalankan berdasarkan kepercayaan dan keyakinan bersama atau berjalan lancar, sebelum perhubungan itu benar-benar hancur apabila responden kedua dan ketiga mula menyaman pempetisyen pertama (lihat perenggan 33).

(2) Terdapat kebuntuan pada peringkat pemegang saham di mana pempetisyen yang mempunyai 50% pegangan saham syarikat manakala responden kedua mempunyai baki 50% dan pempetisyen tidak menghadiri AGM syarikat yang diadakan tahun ini, mengakibatkan mesyuarat itu menjadi tidak lengkap. Walau bagaimanapun, responden meneruskan untuk memuktamadkan minit AGM dan dikatakan meluluskan pelbagai resolusi yang jelas tidak sah. Oleh kerana responden

telah mengakui bahawa hubungan antara pihak-pihak yang telah berpecah belah dengan tidak dapat lagi dipulihkan, ia kelihatan adil dan saksama bahawa syarikat untuk digulung (lihat perenggan 40–41).

(3) Hakikat bahawa syarikat tersebut sudah berjalan adalah bukan alasan untuk tidak membenarkan perintah penggulungan. Mahkamah tidak dapat memutuskan bahawa ia adalah tujuan pempetisyen pertama untuk memfailkan petisyen penggulungan ini untuk memberi tekanan kepada responden kedua dan ketiga untuk bersetuju dengan terma untuk pembelian (lihat perenggan 43–44).]

Notes

For a case on petition, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) para 1605.

Cases referred to

Central Realty Co (Pte) Ltd, Re [1999] 1 SLR 559, HC (refd)
Chua Kien How v Goodwealth Trading Pte Ltd & Anor [1992] 2 SLR 296, CA (refd)
Ebrahimi v Westbourne Galleries Ltd [1973] AC 360, HL (refd)
Foo Yin Shung & Ors v Foo Nyit Tse & Brothers Sdn Bhd [1989] 2 MLJ 369, HC (refd)
Lawrence v Lawrich Motors (Pty) Ltd [1948] SALR 1029, HC (refd)
Narayani Sivaprakaspillai & Ors v Teluk Ansor Agricultural Enterprises Sdn Bhd [2011] 1 LNS 989, HC (refd)
Ng Eng Hiam v Ng Kee Wei & Ors [1965] 1 MLJ 238, PC (refd)
Ng Sing King and others v PSA International Pte Ltd and others (No 2) [2005] 2 SLR 56, HC (refd)
Perak Integrated Networks Services Sdn Bhd v Urban Domain Sdn Bhd (on behalf of themselves and Pins OSC & Maintenance Services Sdn Bhd through derivative action) & Anor [2018] 4 MLJ 1; [2018] 5 CLJ 513, FC (refd)
Yenidje Tobacco Company, Limited, In Re [1916] 2 Ch 426, CA (refd)
Tay Bok Choon v Tahansan Sdn Bhd [1987] 1 MLJ 433; [1987] CLJ Rep 24, PC (refd)
Varusay Mohamed Shaik Abdul Rahman vV Svk Patchee Bros (M) Sdn Bhd [2002] 3 MLJ 674; [2002] 3 CLJ 741, CA (refd)

Legislation referred to

Companies Act 2016 s 465(1)(f), (1)(h)
Companies Act [SG] s 216

Chew Chang Min (Mary Ann Ooi Suan Kim and Jany Fong Chui Nee with him) (OS Kim & Assoc) for the petitioners.
NS Guok (WC Foo and SY Lim with him) (Guok Partnership) for the respondents.

Wong Chee Lin JC:

[1] This is a winding up petition presented by the first and second petitioners to wind up the first respondent company Percetakan Yelian Sdn Bhd ('the company'). I have allowed the winding up petition. These are the full reasons for my decision.

SALIENT BACKGROUND FACTS

[2] Back in 1980, the first petitioner and his brother Liew Ah Kiew @ Liew Then Hin ('LTH') started a printing business and they carried on a partnership. Thereafter the company was incorporated in 1985 with the first petitioner and LTH each holding 1 share in the company.

[3] Throughout the years, the shares of the company were allotted and transferred among the family members which involved the second petitioner, the second respondent and Liew Tin Siew ('LTS'). The paid-up capital of the company was increased to RM500,000 comprising 500,000 shares of RM1 each.

[4] On or about August 2010, LTH passed away and all of his shares were transferred to his wife the second respondent. This resulted in the petitioners collectively holding 250,000 shares which is 50% of the shareholding of the company and the second respondent holding the balance 50% of the shareholding.

[5] The directors of the company are the first and second petitioners, the second and third respondents and LTS. The third respondent is the daughter of the second respondent.

[6] The first petitioner was one of the founders of the company and he claims to have been managing the company since 1980. At all material times, the first petitioner was the business operating licence holder when the business was still a partnership and the first petitioner has been one of the cheque signatories until he was subsequently removed as such by the second and third respondents. The second and third respondents only joined the company in or around 2009 while LTS has his own business Han Hong Motor.

[7] The petitioners claim that sometime in September 2012, the second respondent wanted to dispose of her half undivided shares of the properties whereon the company's business is located to the first petitioner. The first petitioner's solicitors then counter offered to purchase from the second

respondent on terms which were not agreeable to the second respondent resulting in the start of a bad relationship between the first petitioner and the second respondent.

[8] However, the relationship between the parties really became strained after the second and third respondents filed an originating summons in the Kuala Lumpur High Court for leave to bring a derivative action in the name of the company against the first petitioner for alleged breach of his fiduciary duties in 2017. The second and third respondents' allegations were that the first petitioner had breached his fiduciary duties by instructing two employees of the company to sign delivery orders for goods which were not actually delivered which the company then made payment to the suppliers for. The first petitioner denied the allegations made against him and contended that he actually ordered the said goods and he exhibited photographs of the said goods on the premises of the company. That originating summons was dismissed with liberty to file afresh by Justice Nazlan bin Mohd Ghazali who apparently held that a board meeting should be held before filing the originating summons. If the majority of the directors agree to file a legal action against the first petitioner, there is no need to obtain leave from the court.

[9] Subsequently, the directors by majority comprising the second and third respondents and LTS passed a resolution for the company to commence legal action against the first petitioner and in May 2018, a suit was filed in the Shah Alam Sessions Court against the first petitioner.

[10] Very soon after that, the suit was withdrawn with liberty to file afresh towards the end of May 2018. The second and third respondents' position was that they decided it would be more appropriate to file the suit in the High Court. About a month later, an identical suit was filed against the first petitioner in the Kuala Lumpur High Court.

[11] The second and third respondents contend that after the filing of the originating summons, the first petitioner's daughter Liew Jeng Yee who was an employee of the company had put pressure on the two employees (who had signed statutory declarations to state that the first petitioner had instructed them to acknowledge receipt of goods which were never actually delivered to the company) to withdraw their statements in their statutory declarations, an allegation which is denied by the petitioners. According to the second and third respondents, Ms Liew Jeng Yee and the first petitioner were harassing the employees and they had no option but to terminate the employment of Liew Jeng Yee. The said respondents also alleged that Liew Jeng Yee had taken a lot of the records and documents of the company and locked them in a cabinet.

The first petitioner and his daughter had also terminated the employment of the said two employees and this was reversed by the second and third respondents.

[12] On 16 October 2017, the second and third respondents and LTS removed the first petitioner as a cheque signatory for the company's bank account. The second and third respondents say that they had no option but to do so because the first petitioner had refused to sign numerous cheques as a result of which payments could not be made to the Employees Provident Fund, Social Security Organisation, for monthly tax deduction, goods and services tax and income tax. All the directors were blacklisted by the Royal Malaysian Customs Department. In reply to this, the first petitioner said that he had signed the cheques but it was the second respondent who had refused to sign the cheques.

[13] The second and third respondents say that after the originating summons was filed against him, the first petitioner had abandoned management of the company whereas the first petitioner said that he was sidelined and that the second and third respondents had given notice to the employees not to take any instructions from him. On the other hand, there was also an occasion when the first petitioner had instructed the employees only to take instructions from him.

[14] The petitioners alleged that the second and third respondents had removed the company secretary whereas the second and third respondents say that the company secretary had himself resigned.

[15] The petitioner also alleged that the second and third respondents had removed the auditor of the company whereas the second and third respondents say that the auditor had also resigned. However, there was a letter from the company to the auditor informing him that the company wished to change auditors and asked him to tender his resignation letter so it appears that the auditor resigned because he had been asked to do so.

[16] The second and third respondents alleged that the first petitioner through his proxies, being his daughter and his son in law had set up a competing business and tried to get a customer of the company to deal with his new company. The petitioner reply that since the first petitioner's daughter has been dismissed from her employment with the company, she has the right to start her own business.

FINDINGS OF THE COURT

[17] The petition is presented under s 465(1)(f) and 465(1)(h) of the Companies Act 2016 which require the petitioners to show that the directors have acted in the affairs of the company in their own interest rather than in the interest of the company as a whole which appeared to be unfair and unjust to other members and that it is just and equitable that the company be wound up.

[18] The petitioners concede that because none of the deponents of affidavits is subjected to cross examination, the petition must be decided alone on the undisputed facts.

[19] This is based on the case of *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433; [1987] CLJ Rep 24 where the Privy Council affirmed as follows:

> If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits then in the absence of oral evidence or cross examination, the judge must ignore the disputed allegations. The judge must then decide the fate of the petition by consideration of the undisputed fact.

[20] The petitioners allege that the principles in the case of *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 are applicable. They relied on the Federal Court case of *Perak Integrated Networks Services Sdn Bhd v Urban Domain Sdn Bhd (on behalf of themselves and Pins OSC & Maintenance Services Sdn Bhd through derivative action) & Anor* [2018] 4 MLJ 1; [2018] 5 CLJ 513 where the Federal Court quoted Lord Wilberforce as follows:

> [70] Lord Wilberforce went on to enumerate a number of elements typically present where the 'just and equitable' ground is invoked:
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> > The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence — this element will often be found where a pre-existing partnership has been converted into a limited company (ii) an agreement, or understanding, that all, or some (for there may be sleeping members) of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company — so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.
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> > It is these and analogous factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves.

[21] In *Ebrahimi*, the House of Lord held as follows:

> Held, allowing the appeal, that a limited company was more than a mere legal entity and the rights, expectations and obligations of the individuals behind it inter se were

not necessarily merged in its structure (post, p 379B-c); that, while, the 'just and equitable' provision did not entitle a party to disregard the obligation which he assumed by entering a company, it enabled the court to subject the exercise of legal rights to equitable considerations of a personal character arising between individuals which might make it inequitable to insist on legal rights or to exercise them in a particular way (post, pp 379D, 386H–387A); that, in the present case, the appellant and N had joined in the formation of the company on the basis that the character of the association viz, inter alia, that the appellant was entitled to participate in the management, would, as a matter of personal relation and good faith, remain the same; and that, N having in effect repudiated that relationship and the appellant having lost his right to a share in the profits and being in that respect at the mercy of N and G and being unable to dispose of his interest without their consent, the proper course was to dissolve the association by winding up the company.

[22] On the undisputed facts, I cannot make a finding that the first petitioner has been removed from management simply because he has been removed as a cheque signatory on the decision of the second and third respondents and LTS. This is because, if what the second and third respondents allege is true, that the first petitioner has refused to sign cheques to make necessary payments in the interest of the company, then the second and third respondents acted correctly in removing him as a cheque signatory. However, the facts surrounding this issue are disputed so I cannot make a finding that the first petitioner has been wrongfully removed from management of the company.

[23] There are five directors of the company and it so happens that LTS on all occasions vote the same way as the second and third respondents. This does not mean that the first petitioner has been removed from management. All the directors have equal say and the first petitioner should not complain if LTS votes the same way as the second and third respondents. He has not even made LTS a party to the petition.

[24] Because of the disputed facts, I cannot make any finding that the directors or majority directors have acted in their own interest rather than the interest of the company as a whole which appeared to be unfair and unjust to other members.

[25] Essentially, the petitioners rely on two grounds to justify the winding up of the company. They say that the relationship between the parties had broken down irretrievably so much so that the parties cannot even speak to one another and they cannot see eye to eye on anything. Secondly, the petitioners rely on the ground of deadlock at the shareholder level. It is not in dispute that there is a deadlock at the shareholder level. Although the second and third respondents have purported to conduct an annual general meeting of the company to

re-elect retiring directors and to approve the annual accounts of the company, the fact is that the resolutions were not validly passed as the meeting was inquorate, since there was only one member present. The petitioners did not attend.

[26] On the allegation of breakdown in the relationship of the parties, Learned counsel for the respondents admit that there is a breakdown in the relationship between the parties but he submitted that the petitioners have to show a lack of probity on the part of the second and third respondents and they have not been able to do that.

[27] He relied on the case of *Foo Yin Shung & Ors v Foo Nyit Tse & Brothers Sdn Bhd* [1989] 2 MLJ 369 where the court said this:

> The second proposition is from Lord Shaw of Dunfermline in *Loch & Anor v John Blackwood Ltd* at p 788 in which he said as follows:
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> > It is undoubtedly true that at the foundation of the applications for winding up, on the 'just and equitable' rule, there must be a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore, the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is under the statute just and equitable that the company be wound up.

[28] In the book by Loh Siew Cheang, *Corporate Powers Accountability* at p 1273 he said as follows:

> Animosity and bitterness invariably exist between the parties in a soured relationship. However, negative emotional sentiments by themselves may not be the cause of the breakdown but are merely the natural consequences in a relationship that has soured. In Re Brand & Harding Ltd, the disputes between the sisters were over management misconduct of the affairs of the company and they were unable to disentangle their personal animosities from decisions that were required to be taken with respect to the future of the company. The clean hands principle was not applied. Rose J said:
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> > [...] I do not consider that the obligation to come with clean hands means that a petitioner must be able to show that he or she is entirely blameless for the problems that have overtaken the company. Petitions for winding up on just and equitable grounds usually represent the culmination of a long period of argument and disruption form which it is rare for any one party to emerge as having behaved with exemplary politeness and reasonableness throughout. To set such a high standard would, in my judgment, ignore the very realities of human relationships which Lord Wilberforce regarded as the foundation of the jurisdiction. The evidence in this case satisfies me that the Petitioners' hands are

sufficiently clean to invoke the court's jurisdiction.

[29] This case has to do with the principle that the petitioner must come to court with clean hands. It is not relevant to the issue whether there is a necessity for the petitioners to show that there is a lack of probity on the part of the second and third respondents leading to the breakdown in the relationship.

[30] In *Varusay Mohamed Shaik Abdul Rahman vV Svk Patchee Bros (M) Sdn Bhd* [2002] 3 MLJ 674; [2002] 3 CLJ 741 the court held that where the pre-existing partnership had been converted into a limited company and run as a family business, the company was formed and continued on the basis of a personal relationship involving mutual confidence. Thus, as evidence proved that the relationship between the appellant and the respondent had broken down, it also indicated that there is no mutual trust and confidence between the parties. This justified winding up the company on the just and equitable ground.

[31] The Court of Appeal did not make any ruling on whether there was a necessity for a finding that the breakdown in the relationship was due to a lack of probity on the part of the respondent but from the judgment it is clear that certain actions on the part of the respondent was not carried out bona fide.

[32] In the case of *Narayani Sivaprakaspillai & Ors v Teluk Ansor Agricultural Enterprises Sdn Bhd* [2011] 1 LNS 989 the court said this:

> It is obvious from the actions of both sides that the mutual trust and confidence between the Petitioners and the Respondents, in particular, the second and third Respondents have totally deteriorated. There seem to be no direct communication between the parties. Distance is not an excuse for the lack of communication with the technology that we now enjoy. Furthermore, the presence of the various litigations between the Parties filed against each other show the true feelings they have against each other making it impossible to run the Company as a successful entity.

[33] It appears that in a quasi-partnership, as I hold the company to be in this case, a breakdown in the relationship between the shareholders would justify the court in ordering the winding up of the company and it is not necessary to show that there was a lack of probity on the part of the respondents. In this case, I held the company to be a quasi-partnership because it was originally started as a partnership between the first petitioner and LTH before it was converted to a limited company. The shareholders are all family members and the company is run on the basis of mutual trust and confidence or was so run, before the relationship completely broke down when the second and third respondents started suing the first petitioner.

[34] In *Ng Sing King and others v PSA International Pte Ltd and others (No 2)* [2005] 2 SLR 56, the Singapore court dismissed the oppression action under s 216 of the Singapore Companies Act but wound up the company on the just and equitable ground on the basis, inter alia, that there had been an irretrievable breakdown in the relationship amongst the shareholders. In that case, the company was not a quasi-partnership of the *Ebrahimi v Westbourne Galleries Ltd* genre, but a joint venture company, underpinned by a comprehensive shareholders' agreement, which was evidently negotiated at arm's length. Yet the court was of the view that the shareholders could no longer work with each other, though no blame for the breakdown was pinned on either party.

[35] If the petitioners were to be blamed for the breakdown in the relationship between the shareholders, then obviously the petitioners should not be entitled to a winding up order. *Walter Woon on Company Law* refers to a principle in *Ng Eng Hiam v Ng Kee Wei & Ors* [1965] 1 MLJ 238 (PC) that the court has a discretion to refuse a winding up application made by a complainant whose behaviour had caused the breakdown in relations for 'to do otherwise might be tantamount to allowing a wrongdoer to take advantage of his own wrong'. In this case, however, based on the undisputed facts, I cannot attribute the blame for the breakdown in relationship to either the first petitioner or the second and third respondents. The first petitioner seemed more belligerent but I would not say that he was solely to blame for the breakdown in the relationship.

[36] In the South African case of *Lawrence v Lawrich Motors (Pty) Ltd* [1948] SALR 1029, one of two shareholder-directors of a company had an affair with the other's wife. The husband of the unfaithful wife petitioned to wind up the company on the just and equitable ground. The court therein indicated that it was irrelevant whether the director who had committed adultery had caused the breakdown in the relations between the directors. The court, instead, placed emphasis on the point that there was tension or resentment between the quasi-partners, which rendered continued cooperation impossible. In other words, a winding up was justified on the fact or existence of a breakdown and there was no need to show that the respondent was the one to blame for it.

[37] As the author Margaret Chew said in her book 'Minority shareholders' rights and remedies', oftentimes, the reality is that the relationship between erstwhile business partners deteriorates to one peppered with bitterness, virulence and spite, without a catalytic or particularly blameworthy party. The courts are amenable to winding up a company without apportioning fault or blame, on the basis that the parties have fallen out. In *Re Central Realty Co (Pte) Ltd* [1999] 1 SLR 559, Rubin J held that the company concerned ought to be

wound up on the following fault-neutral basis:

> Whatever the true nature of the understanding [between the shareholder-directors], the facts presented by both parties amply demonstrated that there had been a complete breakdown of their relationship. While I was hesitant to attribute blame to either party for the cause of such unpleasant bitterness and rancour, it became apparent that parties were unlikely ever to co-exist in any enterprise between themselves and in this regard I share the sentiments expressed by Wylie J in Re Rango-ma-tane Farms Ltd that 'where there can be no clear cut apportionment of blame for bringing about the breakdown, the real determinant should be the existence of the breakdown, not the cause of it.

[38] This is apparently the thrust behind the traditional notion of 'deadlock' as a basis for winding up a company on the just and equitable ground and this ground is also relied upon by the petitioners. The petitioners rely, inter alia, on the case of *In Re Yenidje Tobacco Company, Limited* [1916] 2 Ch 426. In that case, Weinberg and Rothman were the only two shareholder-directors of a tobacco company. The articles of association provided that both Weinberg and Rothman had equal voting power and if any dispute were to arise and a director's resolution could not be passed, the matter in dispute should be referred to arbitration. Such a matter did arise and was referred to arbitration, which after an expensive and protracted hearing resulted in an award to which Rothman refused to give effect. The parties became so hostile that neither of them would speak to each other. However, despite this acrimony between the incorporators, the company managed to continue to do business and large profits were made. In the circumstances, Weinberg presented a petition for the company to be wound up, alleging that deadlock had arisen. The petition was successful and the company was wound up. Lord Warrington LJ stated:

> I am prepared to say that in a case like the present, where there are only two persons interested, where there are no shareholders other than those two, where there are no means of overruling by the action of a general meeting of shareholders the trouble which is occasioned by the quarrels of the two directors and shareholders, the company ought to be wound up if there exists such a ground as would be sufficient for the dissolution of a private partnership at the suit of one of the partners against the other. Such ground exists in the present case, I think, therefore, that it is just and equitable that the company should be wound up.

[39] The respondents referred to the Federal Court case of *Perak Integrated Networks Services Sdn Bhd v Urban Domain Sdn Bhd (on behalf of themselves and Pins OSC & Maintenance Services Sdn Bhd through derivative action) & Anor* [2018] 4 MLJ 1; [2018] 5 CLJ 513 where the court discussed the principles of winding up in a deadlock scenario. The Federal Court referred to the case of *In Re Yenidje Tobacco Company, Limited* already referred to and the Singapore Court of Appeal case of *Chua Kien How v Goodwealth Trading Pte Ltd & Anor* [1992] 2 SLR 296 and the case of *Ng Eng Hiam v Ng Kee Wei & Ors* also already referred to.

[40] In all three cases, there was a deadlock at both the shareholder level and management level. In the present case, there is a deadlock at shareholder' level in that the petitioners have 50% of the shareholding of the company whereas the second respondent has the remaining 50% and the petitioners did not attend the AGM of the company held this year, resulting in the meeting being inquorate. Nevertheless the respondents proceeded to finalise the minutes of the AGM and purport to pass various resolutions which are obviously void. There is no deadlock at the management level because LTS always votes in the same way as the second and third respondents so they form the majority on the board. The business of the company is still being carried on.

[41] However, maintaining this unhappy status quo would not have been a long term solution. Since the shareholders are deadlocked, directors' remuneration cannot be approved, annual accounts cannot be passed and annual meetings cannot be held or any other shareholders' meetings. Since the respondents have acknowledged that the relationship between the parties has irretrievably broken down, it would appear to be just and equitable that the company be wound up.

[42] I now have to decide whether there are any other factors that may mitigate against the granting of a winding up order.

[43] In this case, the company was a going concern although the first petitioner did allege that it was not making profits. In *Varusay* the Court of Appeal held that on decided authorities the fact that the company is an on-going concern and is capable of making profits has never been considered as a factor that falls within the ambit of the expression 'just and equitable'. The same consideration goes for the fact of undue hardship to workers because practically all business enterprises must employ workers, whether many or few, who will in any event suffer undue hardship as the result of the winding up. Accordingly, the fact that the company is a going concern is not a reason for not granting a winding up order.

[44] The second and third respondents say that they are prepared to buy out the petitioners' shares in the company and also the first petitioner's undivided half share in the properties where the company's premises are located. However, there was a delay and up to the date of the hearing, the shares of the company were still not valued. And the first petitioner is not prepared to give time to the second and third respondents to come up with the valuation report. The first petitioner has never asked to be brought out and has never imposed any terms for the buying out of his shares. Accordingly, I cannot find that it was the intention of the first petitioner to file this winding up petition to put pressure on the second and third respondents to agree to his terms for a buy-out. Accordingly, I cannot refuse to grant a winding up order on this ground also.

A **[45]** In all the circumstances of the case, since it is my finding that the company is a quasi-partnership and there has admittedly been a complete and irretrievable breakdown in the relationship amongst the shareholders, I find that it is just and equitable to grant the winding up order prayed for by the petitioners. I accordingly grant a winding up order and an order that Dato' Ler
B Cheng Chye and Mr Lum Tuck Cheong be appointed to act jointly and severally as liquidators of the company. I also order costs of RM20,000 to be paid to the petitioners out of the assets of the company subject to allocator. I will not make an order as regards the sale of the properties in the joint names of the first petitioner and the second respondent as I do not have jurisdiction to
C make such an order pursuant to a winding up petition.

Petition allowed with costs of RM20,000.

Reported by Nabilah Syahida Abdullah Salleh

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